NO. 82-1771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

ALBERTO ANTONIO LEON, ET AL.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS

AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether evidence obtained as a result of a search warrant subsequently held to be defective for a lack of probable cause should nevertheless be admitted into evidence on the basis of a good faith exception to the exclusionary rule.

INTEREST OF AMICI CURIAE

The Texas Criminal Defense Lawyers Association and the Virginia College of Criminal Defense Attorneys are two non-profit corporations whose membership is comprised of more than 1,500 lawyers, who are Texas and Virginia citizens and attorneys, all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors or judges of the State or Federal Courts.

Among the stated objective of both organizations is to protect and insure by rule of law those individual rights guaranteed by State and Federal Constitutions in criminal cases, and to resist efforts which are being made to curtail these rights. A cornerstone of the organizations' obpective, and of our criminal justice system, is the protection of the individual right of privacy particularly in regard to unreasonable searches and seizures.

The Texas Criminal Defense Lawyers Association and the Virginia College of Criminal Defense Attorneys believe that the Petitioner's proposed good faith/reasonable belief exception to the exclusionary rule would effectively destroy the constitutional mandate against unreasonable searches and seizures found in the Fourth Amendment. The Amicus Curiae Committee of both the Texas Criminal Defense Lawyers Association and the Virginia College of Criminal Defense Attorneys has discussed this case and decided that this issue is of such profound importance to defense lawyers throughout the state and nation that the Texas Criminal Defense Lawyers Association and the Virginia College of Criminal Defense Attorneys should state its opposition to the proposed exception and offer its assistance to the Court.

SUBJECT INDEX

LIST OF AUTHORITIES

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SUMMARY OF ARGUMENT

I. Petitioner's argument that substantial evidence is suppressed or that prosecutions are dismissed or not filed

as a result of the application of exclusionary rule is factually incorrect, and unsupported by any credible, impericle evidence. More importantly, the application of exclusionary rule results in the suppression of only such evidence as would have been unavailable to law enforcement authorities had they abided by the law and the mandate of the Constitution in the first place.

Petitioner's assertion that application of the exclusionary rule engenders disrespect for our judiciary also misses the point, for it is when those who we have entrusted to enforce our laws, violate them that breeds the greatest disrespect for law and order.

II. Probable cause supplies the minimally acceptable standard to determine whether a search warrant should issue. To adopt a good faith exception to the exclusionary rule would authorize the issuance of search warrants on less than probable cause, clearly in violation of the Constitutional mandate of the Fourth Amendment.

III. A good faith exception to the exclusionary rule would undermine the very purpose of the Fourth Amendment and would place upon the accused citizen the onerous burden of demonstrating not only that a search was conducted without probable cause but that the officers were acting in bad faith as well.

IV. The advent of sophisticated technology in assisting law enforcement personnel has gained the acceptance and approval of the various courts. The intrusive nature of these devices threatens the privacy of all citizens, creating a heightened, not diminished, need for Fourth Amendment protections.

ARGUMENT

I.

ACTUAL COST

Implicit in Petitioner's plea for a "good faith" exception to the exclusionary rule is the assumption that considerable evidence is excluded under existing practices. Factually, this assumption is not well founded. The Government's own studies indicate that motions to suppress are filed in only a small percentage of criminal cases [9% of all criminal cases surveyed, Government Accounting Office Study, Comp. Gen. Rep. No. GGD-79-45, Impact of the Exclusionary Rule on Federal Prosecutors (1979), at p. 10], and are rarely granted even then [evidence excluded in only 1.3% of the cases surveyed, Government Accounting Office Study, *supra,* at pp. 9-11]. More importantly, even assuming we could attribute more than a speculative causal relationship between motions to suppress and dismissals, only .7% of the cases in which evidence was excluded resulted in acquittal or dismissal. [Government Accounting Office Study, *supra,* at p. 11].

In short, there is no compelling need to further limit the exclusionary rule's application for its impact in terms of precluding the use of evidence in criminal trials has been greatly exaggerated.

REASONABLE PRICE

Moreover, the drafters of the Constitution most assuredly assumed that law enforcement officers would abide by the Constitution, recognizing that such adherence to the privacy concepts embodied in the Fourth Amendment

would result in relevant evidence not being available to law enforcement authorities.

> "Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary sanction, but surely they expected the commands of the Amendment to be adhered to. 'To the extent that the police obey the constitutional commands, the community foregoes such advantages as it might enjoy from evidence that can only be obtained illegally.' " LaFave, *Search and Seizure*, Vol. 1, p. 23, West Publishing Co., St. Paul, 1978.

In short, the price paid by the application of the exclusionary rule is no more than would be exacted were the police to have acted lawfully and complied with the Constitution in the first place. The Drafters of the Constitution obviously considered this was not too high a price to insure that the citizen's privacy was vouchsafed.

SOCIETY'S COST

Petitioner suggests that the exclusionary rule may " . . . serve to lessen public respect for the judicial system" because its "indiscriminate application" will generate "disrespect for the law and administration of justice" [Petition for Writ of Certiorari, at pp. 71-72].

Petitioner's argument that the exclusionary rule is "indiscriminately applied" is misplaced and exaggerated. Few motions to suppress are granted and even fewer prosecutions result in acquittal or dismissal. And in those few cases that result in evidence being suppressed, society is deprived of no more evidence than it would had the officers acted lawfully in the first place. If there would have been no evidence to prosecute someone had the

officer's abided by the constitution then the fact that exclusion of that illegally obtained evidence may result in an acquital would hardly seem "disproportionate". In practice, most cases in which motions to suppress are granted, nevertheless result in conviction, based on other legally obtained and admissible evidence.

And while Petitioner suggests that the "deterrence rationale" underlying the exclusionary rule is "hardly more than a wistful dream" [Petition at p. 72, quoting Burger, C.J., dissenting; *Bivens v. Six Unknown Agents,* 403 U.S. 398, at p. 415], the Government at the same time argues that its application has a "chilling effect on legitimate police activities" [Petition, at pp. 73-4]. Such arguments are inherently self-contradictory. It could hardly be suggested that application of the exclusionary rule substantially chills "legitimate police activity", without "deterring" illegal police conduct. If, as Petitioner suggests application of the exclusionary rule causes law enforcement authorities to conduct themselves more cautiously when their "course of action brings [them] closer to the indistinct line separating lawful from unlawful" police conduct [Petition at p. 73], then so much the better. That is precisely what was intended.

More importantly, it is when those entrusted to enforce our laws violate them that breeds greatest disrespect for law and order.

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. . . . Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government

> becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

IMPERATIVE OF JUDICIAL INTEGRITY

Furthermore, deterence of illegal police conduct is not the only theory underlying the exclusionary rule. The rule also serves to maintain the "imperative of judicial integrity" by extricating the courts from participation in that illegality. In this system of government the courts stand as the citizen's sole protection against its protectors.

> "[Fourth Amendment rights] . . . are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. . . .
>
> But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside the court." *Brinegar v. U. S.*, at 180-181 (1949) (Jackson, J., dissenting).

As this Court noted in *Terry v. Ohio*, 392 U.S. 1 (1968), in addition to deterring illegal police conduct:

> "The rule also serves another vital function—'the imperative of judicial integrity'. . . . Courts which sit under our Constitution can not and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." at p. 13.

II.

OBJECTIVE NOT SUBJECTIVE GOOD FAITH IS ALREADY THE APPLICABLE STANDARD FOR DETERMINING PROBABLE CAUSE

This Court has often reiterated that whether a search is performed with or without a warrant, the legality of

said search must be measured by the objective probable cause standard. *Illinois v. Gates,* ____U.S.____, 76 L.Ed. 2d 527 (1983); *Texas v. Brown,* ____U.S.____, 103 S.Ct. 1535 (1983); *Taylor v. Alabama,* 457 U.S. 687 (1982); *Massachusetts v. White,* 439 U.S. 280 (1978); *Ker v. California,* 374 U.S. 23 (1963); *Draper v. U. S.,* 358 U.S. 307 (1959).

To adopt the good faith exception on the scale suggested by petitioner would potentially uphold searches and seizures without the showing of probable cause expressly required by the Fourth Amendment. To allow such practice would relegate the Fourth Amendment to a hollow talisman, deteriorating the very foundation of the Amendment: "that no warrant shall issue but upon probable cause." "I do not propose that a warrant clearly lacking a basing in probable cause can support a 'good faith' defense to invocation of the exclusionary rule." *Illinois v. Gates,* ____U.S.____, 103 S.Ct. 2317, at p. 2345, note 17 (1983).[1]

GOOD FAITH CONTAINED WITHIN PROBABLE CAUSE QUOTIENT

Last term, this Court again examined the unsettled question of what quantum of evidence constitutes probable cause to support the issuance of a search warrant. This Court announced the "totality of circumstances" test which requires the magistrate to review the sum total

1. "We do not face here the fit of *Williams* to an arrest or search by officers holding a warrant found deficient for lack of probable cause. We leave for later the question of whether a good faith proviso to the exclusionary rule ought ever to tolerate an arrest or seizure without probable cause measured objectively." *U. S. v. Mahoney* (5th Cir. 1983) 712 F.2d 956, at p. 960 n.4.

of all the facts and circumstances to determine the "fair probability" that the evidence sought will be in the place to be searched. *Illinois v. Gates,* ____U.S.____, 103 S.Ct. 2317, 2331-2 (1983).

By the very definition propounded by this Court, the good faith belief of the officer is an integral and necessary part of the probable cause formulation. *Draper v. United States,* 358 U.S. 307 (1959); *Brinegar v. United States,* 338 U.S. 160 (1949): "We may assume that the officers acted in good faith in arresting the petitioner. But 'good-faith' on the part of the arresting officer is not enough." [citation omitted]. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. *Beck v. Ohio,* 379 U.S. 89, 97 (1964). Thus, the officer is required to bring before the neutral and detached magistrate his subjective belief coupled with hard core evidence so that an independent determination can be made as to the existence of probable cause. If the arguments advanced by the Petitioner are adopted by this Court, then the requirement that an application for a search warrant be subjected to judicial scrutiny would become, at best, a mere formality. More importantly, a good faith exception would sanction the issuance of search warrants on less than probable cause. Such a result would clearly violate the letter and spirit of the Fourth Amendment.

PROBABLE CAUSE IS APPROPRIATE PROTECTION AGAINST ZEALOUS OFFICERS

The good faith or reasonable belief of law enforcement officers can never be considered as a viable alternative

to the probable cause requirement. The "experience and expertise" of the officer, often used as a synonym for good faith, rightfully belongs as part of the determination of probable cause but can not be used in substitution thereof. *U. S. v. Ortiz*, 422 U.S. 891 (1975); *U. S. v. Brignoni-Ponce*, 422 U.S. 873 (1975). The requirement of probable cause is not too high a price to pay for the security and safety of all citizens. While the real or manufactured good faith of the officer plays a vital role in the procurement of a search warrant, this Court has recognized the competition that exists between constitutional protections and the quest for evidence.

> "It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." See also: *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 75 L.Ed. 374, 382, 51 S.Ct. 153." *Coolidge v. New Hampshire*, 403 U.S. 443, 455, n. 4.

III.

GOOD FAITH EXCEPTION CREATES MORE PROBLEMS THAN IT SOLVES

In adopting a good faith exception to the exclusionary rule, this Court is, in reality, opening Pandora's box. The Fourth Amendment is constantly in a state of flux, and the addition of a good faith exception, which, by its very nature is undefinable, will only create more confusion and backlog the various state and federal courts. *See, LaFave, The Fourth Amendment in an Imperfect World:*

On Drawing "Bright Lines" and "Good Faith", 43 U. Pitt. L. Rev. 307, 354-359 (1982).

Should this Court adopt a good faith exception, then the vitality and strength of the Fourth Amendment would be reduced to fifty-four words that have no meaningful substance. As was noted by Justice Brennan, a good faith exception would stop all development of fourth amendment law because, without clear precedent, no officer would not be acting in good faith. *U. S. v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting).

Secondly, a good faith exception would change the entire focus of a Suppression hearing: rather than determining if the search or seizure violated the Fourth Amendment, the trial Court would be required to examine the subjective knowledge of the searching officer. Thirty-five years ago this Court recognized the conflicting interests of a citizen's Constitutional right to be protected from unlawful searches and seizure, and a police officer's quest for evidence: "officers engage in the often competitive enterprise of ferreting out crime." *Johnson v. U. S.*, 333 U.S. 10, 14 (1978). The testimony of the officers state of mind would consist of his self-serving and often uncontradicted testimony. As a practical matter, when viewed from the standpoint of the officer, an otherwise unlawful search or seizure may be redeemed simply by uttering words to the effect that the conduct was done in good faith.

POLICING THE POLICE

The reality of such an exception to the exclusionary rule would require our Courts to police the very individu-

als who have taken an oath to uphold the law. How often would an officer admit that his conduct was not grounded in a good faith belief?[2]

> "Nothing can destroy a government more quickly than its own failure to observe its own laws, or worse, its disregard of the character of its own existence. . . . Our government is the potent, the omnipresent teacher for good or for ill, it teaches the whole people by its example. . . . If the government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

Mapp v. Ohio, 367 U.S. 643, 659 (1961).

Thus, the presumptively innocent citizen will have to bear the insurmountable burden of demonstrating that the officer violated the Fourth Amendment *and* was not acting in good faith when he did so. If our enlightened forefathers drafted the Constitution and Amendments to insure that nine guilty men go free so that the innocent citizen likewise obtains his freedom, then the good faith exception will guarantee that the innocent and guilty are punished.

IV.

TECHNOLOGICAL ADVANCES HEIGHTEN NEED FOR FOURTH AMENDMENT PROTECTIONS

This decade has marked the beginning of extraordinary technological advances which will undoubtedly change

2. The revelations in the book, "Prince of the City" shocked many lay people to find out that a Detective had committed perjury approximately twenty times just to secure drug convictions.

the course of investigative practices and policies.[3] It is imperative that the penumbra of the Fourth Amendment be preserved and protected:

> "The high technology, electronic age in which we live highlights and exacerbates the historical tension between liberty and order. In this opinion we have attempted to bestow upon the right to privacy the dignity and primacy that it deserves, while cautioning governmental authorities that obedience to the law is essential lest respect for the law diminish to a point of nonexistence. To permit the government to invade the constitutional rights of its citizens is too high a price to pay for law enforcement. Certainly law enforcement officers must have powers and authorities, but we must be parsimonious and niggardly in opening up the private elements of our lives in the name of catching a marijuana salesman or two. We must be careful not to mutilate the fourth amendment bit by bit and piece by piece, until it is relegated to a position of near obscurity."

U. S. v. Butts, supra, at pp. 1152-53.

CONCLUSION

It is hard to imagine that our society can be truly free from unreasonable searches and seizures when same is contingent upon the real, imagined, or manufactured good faith of law enforcement officers. The goal of punishing the guilty must not be achieved at the expense of sacrificing the fundamental law of the land.

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3. With the onslaught of modern technology, the various law enforcement agencies have resorted to and the Courts have approved the latest forms of sophisticated gadgetry to aid in the detection of crime. *U. S. v. Knotts,* ____U.S.____, 103 S.Ct. 1081 [beeper]; *U. S. v. Butts* (5th Cir. 1983) 710 F.2d 1139 (rehearing *en banc* granted [transponder]; *U. S. v. Alfrey* (5th Cir. 1980) [night vision devices].

> "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less important."

Coolidge v. New Hampshire, 403 U.S. 443, 455.

The decision in this case will be of profound importance to each and every citizen in our nation as it will dictate the future course of conduct to be followed by law enforcement personnel. *Amici* vehemently urges the Court to reject the Petitioner's proposed good faith exception to the exclusionary rule and affirm the Ninth Circuit's decision.

Respectfully submitted,

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